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IN THE

Supreme Court of the United States

October Term, 1953

No. 17

PARTMAR CORPORATION AND FANCHON & MARCO, INC.,
Petitioners,

v.

PARAMOUNT PICTURES THEATRES CORPORATION, ET AL.,
Respondents.

BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September, 1953

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OPINIONS BELOW

The opinion of the District Court is printed at Record p. 70, and is reported at 97 F. Supp. 552. A per curiam opinion of the Court of Appeals is printed at Record p. 432, and is reported at 200 F. 2d 561.

JURISDICTION

The jurisdiction of this Court is based on section 1254 of the Judicial Code. (28 U. S. C. A., sec. 1254). The judgment of the Court of Appeals was entered on December 16, 1952, and a petition for certiorari was granted by this Court on May 25, 1953, No. 641, 345 U.S. 963.

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STATEMENT

On May 1, 1947, Paramount Pictures Theatres Corporation brought a landlord and tenant suit in the United States District Court at Los Angeles to evict Partmar Corporation from a motion picture theatre in Los Angeles, which it occupied under a lease from Paramount and in which it was engaged in the motion picture exhibition business. The action was brought in the federal court because of diversity of citizenship. In the action Partmar filed counterclaims against Paramount and new parties were brought in as counterclaim defendants, for treble damages under the antitrust laws, based on the fact that Paramount and the others had been engaged in the unlawful restraint and monopolization described in *United States* v. *Paramount,* 334 U. S. 131, and that by that restraint and monopoly had compelled Partmar to pay excessive theatre rentals and license fees for pictures needed for the operation of the business. (R. 27) By order of the District Court, the eviction suit and the counterclaims were separated for different trials. (R. 44) After a trial of the eviction suit alone, eviction of Partmar was denied. (R. 109) Without any trial of the counterclaims, which had previously been held by the court to be well pleaded and valid, they also were dismissed with prejudice, in the judgment denying eviction. (R. 109, 115) The dismissal of the counterclaims was affirmed per curiam by the Court of Appeals for the Ninth Circuit. (R. 432)

Petitioners contend that dismissal of the counterclaims without trial was contrary to due process of law, and that the dismissal cannot be sustained on principles of *res judicata.*

The complaint in the eviction suit alleged that on August 30, 1939, Paramount *Pictures,* Inc. (the predecessor in title of Paramount Pictures *Theatres* Corporation, the plaintiff in the eviction suit), made a lease of the theatre to Partmar for a term ending March 18, 1952, subject to earlier termination at the option of the landlord, if a contract by Paramount Pictures, Inc., for furnishing motion

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pictures to Partmar for use in the theatre should be terminated "for any reason whatsoever". (R. 9-10, 211-212.)

Fanchon & Marco, Inc., the other petitioner, owns all of the stock of Partmar, and was sued in the eviction case as a guarantor on the lease.

The contract for furnishing pictures had been entered into simultaneously and ran coterminously with the lease. In the complaint it was called a "franchise". (R. 8) It granted a general license to Partmar for the use of Paramount pictures in the theatre, and required that pictures of that company should be used in the theatre for forty-six weeks of each year. It granted no license for any specific pictures, merely providing for making specific contracts on a one year basis during the life of the franchise.

On September 29, 1944, Paramount Pictures, Inc., conveyed the title of the theatre and assigned the lease to Paramount Pictures Theatres Corporation, of which it owned all of the stock. (R. 12)

It was alleged that on December 31, 1946, the United States District Court for the southern district of New York, in *United States* v. *Paramount Pictures et al.*, had entered a judgment that Paramount had violated the Sherman Act, and had enjoined the further performance of any franchises; i.e., any contract with an exhibitor for licensing pictures for exhibition, in effect for more than one motion picture season. (R. 13-14, 302.) The complaint alleged that as to franchises the judgment was "final".[1] The allegations of the complaint are clear and literal that the franchise had been enjoined as an unlawful part of the monopolization and conspiracy in *United States* v. *Paramount*—in the allegations that Paramount had been sued by the government for violation of the Sherman Act, that there had been a trial, and that a "final" judgment had been entered in the case against Paramount for violation of the

[1] The Los Angeles district court said in its opinion in the eviction suit, "Paramount knew this was not a final decree", that "Not only did Paramount know at the time notice of termination was given that the decision in 70 F. Supp. 53 was not a final decision, but it actively participated in an appeal to the Supreme Court from at least a part of that decree." (R. 75.)

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statute, in which the franchise and other practices had been enjoined. The complaint stated that the New York District Court decided "among other things, that all franchise agreements granted by Paramount Pictures and the other defendants therein, were, from their formation, and are an unlawful restraint of trade and were and are in violation of said Sherman Act." (R. 12-13.)

It was alleged that on March 26, 1947, Paramount Pictures, Inc. notified Partmar that the picture franchise had been terminated by the judgment in the government case; and on April 2, 1947, Paramount Pictures Theatres Corporation notified Partmar that it had exercised the option to terminate the lease, and demanded immediate possession of the theatre, which Partmar refused to yield. (R. 17)

There was no allegation that the tenant was not making rental payments or otherwise fully performing the terms of the lease.

Petitioners moved to dismiss the eviction suit on the ground that, as the franchise had been enjoined because of violations of law by the landlord's predecessor in title and its 100 percent stockholder, the court was being asked to grant relief to a wrongdoer based on his own wrong. The motion was denied. (R. 392, 423-424)

In their answer (filed July 10, 1947) petitioners admitted the allegations of the complaint that Paramount had been sued, tried and enjoined for violation of the Sherman Act, and admitted that certain franchises had been held to be unlawful and prohibited. But petitioners denied that the injunction had any application to the particular franchise for furnishing pictures to Partmar; and they denied that the injunction was final. (R. 28, 44.)

Petitioners set up as defenses that Paramount was a party to the conspiracy in *United States* v. *Paramount*, and was seeking to evict Partmar in pursuance of that conspiracy, that the effect of the eviction would be to drive Partmar out of business and enable Paramount to take

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over the theatre, and thus to increase and extend an unlawful control of theatres. (R. 27, 30-34, 392, 395, 422)

These defenses, which raised the issue of the existence of the conspiracy and of the connection between the conspiracy and some terms of the franchise and lease, were stricken out on motion, as an improper collateral attack on the right of the landlord to recover possession of the theatre. (R. 115, 424)

That decision established for the case, that there was an entire distinction between the controlling issues in the eviction suit and the controlling issue of conspiracy in the defenses.

The counterclaims were for treble damages and injunctive relief. (R. 36, 43) They were alleged to be based upon the conspiracy in *United States* v. *Paramount*. It was also alleged that as "part of the aforesaid conspiracy" Partmar had been required to license pictures from Paramount for 46 weeks of each year. (R. 38)

The damages claimed were for monopoly overcharges exacted by Paramount for pictures furnished for the theatre and for theatre rentals; that is, for the difference between the license fees and theatre rentals which would have been paid in an unrestrained and unmonopolized market, and the fees and rentals which had been paid under the conspiracy and monopoly conditions found in the government case to have been established by Paramount and others.

The counterclaims named as defendants seven parties who were not parties to the eviction suit—Paramount Pictures, Inc. and six of its principal officials. (R. 36)

On motion to dismiss the counterclaim, they were sustained as valid actions under the antitrust laws. Both actions—the eviction suit and the treble damage claims—were then at issue on the facts.

This decision sustaining the counterclaims was consistent with the decision striking the defenses, and implied the

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same distinction between the issues in the eviction case and the counterclaims. The decisions were, in effect, that conspiracy would not defeat the suit to recover possession of the theatre, but that the same conspiracy would sustain the counterclaims for treble damages and injunctive relief.

Shortly after the decision sustaining the counterclaims as valid, the eviction suit and the counterclaims were formally separated for trial, by order of the District Court, on motion of respondents. The order provided for entirely separate trials of the two suits, and for trial of the eviction case first. (R. 44-45)

The separation also recognized and was based upon the difference between the issues and the merits of the eviction suit and of the counterclaims. As petitioners agreed that this was correct, they made no objection to separate trials.

At this stage of the case, the whole basis of the eviction suit was suddenly swept away by the decision of this court on May 3, 1948, in *United States* v. *Paramount,* 334 U. S. 131. In that decision this Court reversed the prohibition of franchises and remanded the subject to the District Court. This Court said: "We cannot say on this record that franchises are illegal *per se* when extended to any theatre or circuit no matter how small." (p. 156) As that decision negatived the fact on which the eviction suit was based—termination of the franchise—petitioner moved for dismissal; this time on the ground that the case had become moot by the demonstrated nonexistence of the basic fact. The motion was denied. (R. 46, 404, 424)

In opposing this motion, Paramount made an about face and argued that the judgment in the government case had nothing to do with the eviction suit, that the eviction suit turned upon "the inherent validity or invalidity" of the franchise, wholly apart from the judgment of the District Court in the government case. As the reversal of the franchise injunction by this Court made it impossible to oust Partmar on the ground alleged in the complaint, Paramount deserted that ground and based the claim for re-

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possession on the radically different grounds (1) that the franchise was in unlawful restraint of trade, standing alone and apart from the conspiracy in the Paramount case, and (2) that the franchise had been terminated by Paramount for that reason and independently of the judgment in the government case. Specifically, it was asserted that the franchise was unlawful, standing alone, because it provided that Paramount should fix the admission prices to be charged at the theatre, required the theatre to use Paramount pictures exclusively, and provided for the imposition of clearances to be determined by Paramount. (R. 46-47)

This change of position very carefully, specifically and wholly excluded from the eviction suit, as immaterial, the character of the franchise in a setting of monopolization and conspiracy in restraint of trade. The District Court fully approved this new thesis as to the issue in the case. The district judge said:

> I am at a loss still to understand what the New York action has to do with this case unless it is merely to set a precedent which we can follow here * * * (R. 47)
>
> But here, the question is, was this franchise agreement legal or illegal under the Sherman Act. That is a question to be determined here, not in New York or somewhere else * * * (R. 47)

The change of issues and exclusion of conspiracy, was not accomplished by any change in the pleadings or by other formal procedure. As no amendment of the complaint or other procedural action was taken to make the change, it was not possible for petitioners to oppose or deny the new case by any responsive pleading. The case was to be tried, therefore, by rejecting the standard stated in the pleadings, and according to the general academic concept of the lawfulness or unlawfulness of the franchise *per se*. Accordingly, if the landlord should convince the court that the franchise was unlawful because of restraints imposed by

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the landlord or its parent picture corporation for their benefit, the court should award the landlord possession of the theatre, and turn the tenant out.

Petitioners perforce made their defense at the trial conformably to the case as thus devised by the landlord and sanctioned by the court. Petitioners, therefore, based their case upon the propositions (1) that the self-accusation of unlawful conduct by the landlord was unnatural and not permissible as a basis for judgment in his favor or even for any trial of the case, (2) that it was elementary that the franchise, standing alone and apart from the conspiracy, was lawful, and (3) that the cause of the restraints and monopoly conditions existing in the motion picture business in the Los Angeles area was not the franchise, but the monopolization and conspiracy shown in the government case.

The eviction suit trial began on November 8, 1950. For eighteen daily sessions of the court, it continued, and at length ended in a decision denying eviction.

The distinction between the issue in the eviction suit and the issue in the counterclaims—(1) illegality of the franchise standing alone, and (2) the conspiracy in the government case—was consistently maintained throughout the trial, and the order separating the two cases remained effective without change. No order or stipulation or procedure to the contrary occurred. At the opening of the eviction suit trial, counsel for the landlord said that both sides had prepared their case pursuant to the separation order—

> so that the evidence will proceed, so far as the plaintiff is concerned, and I believe it has been indicated by counsel for the Fanchon & Marco and Partmar group that they are prepared to proceed accordingly in pursuance of Judge Mathes' order for these separate trials. My opening statement, therefore related solely to this first separate trial on the unlawful detainer and I reserve the opening statement on the counterclaims to a later time—perhaps next month when we get to that, or earlier if we do so, and I understand that coun-

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sel for the defendants are preparing their presentation and their statements accordingly. (R. 118)

See also Record, pages 114, 115, 116, 117.

Accordingly, the opening statements of both parties were confined to the character of the franchise standing alone and apart from conspiracy. No witnesses were called and no evidence was presented by petitioners to establish, or by respondents to rebut, the counterclaims and the conspiracy upon which they were based, and no arguments or briefs for or against the counterclaim were at any time made or submitted to the court by any of the parties.

Judgments in the government case were introduced in evidence by the landlord. (R. 299, 312) The judgment of the district court in that case, of December 31, 1946, which contained the injunction against franchises on which the eviction suit was based, and which had been vacated as to franchises by this Court in its decision of May 3, 1948, and a second judgment of March 4, 1949, were offered and accepted, but subject to a limitation which nullified them as any evidence of the conspiracy in the Paramount case.

They were offered by the landlord "for the limited purpose only of showing Paramount as being subject to the injunctive features" of the judgments, "for the limited purpose of the court considering those portions of that decree pertinent to this case of the unlawful detainer." (R. 128-130) Petitioners objected to the limitation because it emasculated the judgments of their full and intrinsic, conclusive and legal evidentiary quality against Paramount. But the objection was overruled, and the Court expressly refused to give the judgment any evidentiary effect at all as to the existence of the conspiracy. In overruling the objection the trial judge said "when it comes your turn, if you want to introduce it or make a motion that it be received in toto, you can."[1] (R. 130-131) Peti-

[1] This ruling on evidence is referred to merely for the purpose of showing that the issue of conspiracy was not being considered by the court in the eviction suit. As petitioners prevailed in the eviction suit, they do not now attribute any significance to it as an erroneous ruling on evidence in that suit.

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tioners' "turn", which was to occur at the scheduled later trial of the counterclaims, never arrived, however, because of the preemptory dismissal of the counterclaims.

From time to time throughout the trial, the trial judge stated that no evidence of conspiracy had appeared in the case, thus making plain that the order separating the two cases for trial and postponing and excluding the issue of conspiracy until the later trial of the counterclaims, was being continuously observed. On the twelfth day of the trial the trial judge said:

> So far as this case (sic), there hasn't been one iota of evidence to indicate there was any conspiracy with Paramount, Fox, Warner Brothers, or any other producer or distributor.
>
> The only thing you have got in this case so far is the decision in the Supreme Court case in which it says, "In the country as a whole there is a conspiracy." They didn't say in Los Angeles there is a conspiracy.[1] It might be inferred, because Fox, Warner Brothers, Paramount, and the other producers operated in Los Angeles, there is a conspiracy, but so far there hasn't been anything to show that any agreement that was made by Paramount was made in conjunction with a similar agreement made by Warner Brothers or even with Warner Brothers' or Fox's knowledge that the agreement was being made. (R. 137-138)

On the seventeenth and next to last day of the trial, the trial judge said:

> So far, in this case, there hasn't been any evidence of any kind that there has been a conspiratorial relationship between Paramount and any other of the distributors or the exhibitors. (R. 142)

At the close of the trial of the eviction suit, on December 21, 1950, the trial of the counterclaims was postponed by the

[1] The logic here seems to be that the "whole" of the country does not include that "part" which is Los Angeles.

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court pending a decision of the eviction suit. In its opinion the district court stated:

> At the time of trial it was agreed that action on the counterclaims should be postponed until after the trial of the main issue involved, and no evidence was offered by either plaintiff or defendant on the counterclaims. (R. 94)

The eviction suit was not decided until May 2, 1951. In the meantime briefs were prepared and submitted to the court by the parties. The briefs on both sides considered only the question whether the franchise was a contract in unlawful restraint of trade, as a single contract, standing alone and apart from the conspiracy in the government case.[1] Respondents have designated for the Record the brief filed by petitioners, and it is printed at Record pages 45-70. That brief defines the issue as stated. (R. 45-47)

On May 2, 1951, the court decided the eviction case against the landlord, denying the eviction on the ground that the judgment in the government case had not terminated the franchise. (R. 93)

The court went further, however, and found that the franchise had not been made as a part of or a result of any combination or conspiracy between Paramount and others; and concluded that for that reason petitioners could not recover upon the counterclaims. (R. 104) The counterclaims were dismissed with prejudice. (R. 110) In its written opinion, the Court said:

> It appears that all of the counterclaims, with the exception of the third counterclaim, are based upon conspiracy. As we find no substantial evidence of a conspiracy in this case on the part of Partmar or Paramount, we are of the opinion that the counterclaimant cannot recover upon the first, second and fourth counterclaims. Therefore, it will not be necessary to take evidence on such counterclaims. (R. 94)

[1] The thesis of both briefs was, of course, unreal and academic. But as the court required the case to be tried on that thesis, petitioners had no alternative but to make the correct though academic contention that the franchise isolatedly considered was lawful.

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The findings of fact contain but two small fragments as to the character of the franchise standing alone: (1) that it was not the purpose or effect of the franchise to restrain or monopolize trade; and (2) that the admission price provision in the franchise was no more than one agreement between one exhibitor and one distributor applicable to but one theatre. (R. 104)

But the opinion of the district court shows that the question of the legality of the franchise standing alone, was considered, decided, and was decisive of the case. (R. 70)

The court first considered whether the judgment in the government case was a legal reason for termination of the franchise. It said "The first question presented to this Court is whether a decree, which is subsequently set aside, is a legal cause or reason for termination of the franchise agreement." (R. 75-76) It decided that the judgment "was not a legal cause or reason for terminating the franchise agreement." (R. 77)

The court next considered the question whether the franchise was violative of the antitrust laws standing alone and apart from the conspiracy. The court said:

> Plaintiff contends, however, that if it was not justified in terminating the franchise agreement because of the decree, nevertheless it did have a right to terminate the franchise agreement as it was an illegal agreement and was illegal from its inception and thus could be terminated at any time. Hence, we now proceed to the question of the legality of the franchise agreement. (R. 77)

Having considered that question, the court decided that "the franchise agreement is not *in itself* an illegal agreement". (R. 93) But the clear distinction between that question and the legality of the franchise as part of conspiracy, was emphasized by the court, as follows:

> If the parties to the franchise agreement had combined to restrain freedom of interstate commerce in the transportation, sale or exhibition of motion pic-

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tures, the position of plaintiff that the franchise agreement is void might be tenable * * * (R. 89)

The evidence in this case shows at most nothing more than one agreement on admission prices between one film company and one exhibitor, applicable to one theatre. (R. 89)

* * * * * * *

If plaintiff had established by competent evidence that the prices as set forth in the franchise agreement were, in general, uniform and used by other theatres as the result of a price fixing agreement by the film companies or the exhibitors, there would be some basis for the Court to sustain plaintiff's contention. However, a single contract between one film company and one exhibitor is not violative of the Sherman Act. (R. 89-90)

In its findings, conclusions and opinion, however, the Court dealt with the subject of conspiracy. It found and concluded that the franchise was not a part of or result of any conspiracy, as follows:

Paramount, not in conjunction with any other major studio, entered into the franchise agreement * * *. Neither said franchise agreement, nor said lease, nor any amendment to either of them constituted any part of, nor were they or any of them entered into as a result of any agreement, combination or conspiracy of any kind whatsoever between Paramount and any other person or persons, nor between Partmar and any other person or persons. (Finding 20, R. 103-104)

To the same effect, the court concluded:

Inasmuch as the said lease and franchise agreement and all amendments to each of them were in all respects lawful and were not entered into nor performed as a result of any combination or conspiracy of any kind whatsoever on the part of either plaintiffs, defendants, third party plaintiff or third party defendants, with any person or persons; * * * third party plaintiffs, and each of them, cannot recover upon the first, second and fourth counterclaim, or any of them. (R. 107-108)

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But the court also actually found the facts which constitute conspiracy. It stated that the distributors of pictures (among whom the counterclaim defendants are included) had solved the problem of distribution of pictures among exhibitors by a "code of conduct" which had been developed and adopted by all of the major companies, for the regulation and allocation among exhibitors of runs, clearances, minimum admission prices, etc., and that there was a system of runs, clearances and fixed admission prices, which had been "built up", "founded" and "established" by the distributors, as a "course of conduct" and "policy". (R. 79-80, 82, 84, 102)

The court decided that this system of runs, clearances and fixed admission prices was not a conspiracy nor unlawful because the system was necessary, and that "as a matter of necessity" the distributors were forced to develop and apply a scheme and plan of distribution by which the runs and preferences in the exhibition of pictures were allocated. (R. 80, 81, 102, 106)

The court found that there existed in Los Angeles a vertical combination control by the picture companies of the first-run theatres. Specifically that—

> For many years in Los Angeles it was the established practice for each of the major motion picture producers to own and operate its own first-run theatre in downtown Los Angeles for the purpose of the initial run of pictures produced by the respective companies. (R. 101)
>
> * * * * *
>
> Over the years producers and distributors have founded a course of conduct based upon the rights to exhibit films, first, second or third run within a given community.
>
> Certain specified theatres have had the right of third-run; others have had the right of second-run, while still others have had the right of first-run.
>
> Producers and distributors have also built up a policy of clearance between the end of the first run and the beginning of the second run, the end of the second run and the beginning of the third run. (R. 102)

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QUESTIONS PRESENTED

1. Where claims for treble damages for violation of the antitrust laws have been filed as counterclaims, and they have been sustained as valid and not otherwise barred, and a separate trial of the main action apart from and preceding a trial of the counterclaims has been ordered by the court, and the issue of fact and law in the counterclaims and the main action are different, and a separate trial of the main action has been had—may the court dismiss the counterclaims with prejudice at the end of the trial of the main action and without any trial of the counterclaims.

2. Whether an adjudication in one case, that one contract granting a license for the use of motion pictures in one theatre, which contains admission price fixing provisions and other restrictive conditions in favor of the licensor, is not, standing alone, violative of the antitrust laws is also in legal effect a conclusive adjudication that the contract is not part of a general conspiracy for fixing admission prices and imposing other restrictions on a nationwide scale, and therefore constitutes a bar to an action for treble damages based on such conspiracy.

3. Whether such an adjudication, bars treble damage claims under the antitrust laws by the licensee, for recovery of conspiracy and monopoly overcharges on the pictures which have been licensed under the contract for use in his theatre.

4. May a court entertain an action in which the plaintiff alleges that he has been guilty of violating the antitrust laws, and has been prohibited by the judgment of another court from continuing the violations, and in which the plaintiff seeks a judgment in his favor based on the fact of his violation.

5. Whether a system for the allocation of motion pictures among exhibitors for use in their theatres, by which practically every theatre in every community throughout the United States, including Los Angeles, is classified in

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a fixed position as to the run and clearance for which it may receive licenses for pictures—which system has been built up, accepted, adopted and practiced by the major distributors, who distribute eighty or more percent of the pictures, and according to which the theatres of the distributors receive practically exclusively the first and preferential use of the pictures—and which is effectuated by uniform and unanimous refusals of the distributors to license pictures to anyone on any other terms—constitutes a conspiracy in restraint of trade in violation of the anti-trust laws.

ARGUMENT

Dismissal of the Treble Damage Claims Without Trial Deprived Petitioners of Their Property Without Due Process of Law

The counterclaims are based on the fact that the only market in which petitioners could procure pictures for the operation of their theatre was restrained and monopolized by the unlawful action of respondents and others, and that they had to submit to the conspiracy and monopoly terms, conditions and rentals for pictures which were imposed by respondents, or get out of the business.

The view of the district court seems to be that unless the particular contracts on which the pictures were licensed to petitioners contained provisions which were in unlawful restraint of trade apart from the conspiracy and monopolization, no recovery for excessive charges attributable to the abnormal market conditions which the conspirators had created can be had.

The particular kind of contract on which petitioners procured pictures, and the particular kind of lease on which they held the theatre, was immaterial to their claim for treble damages. That claim was based on the fact that they licensed the pictures and leased the theatre, that the picture and theatre rentals were increased by the conspiracy in restraint of trade, and that having paid license

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fees and theatre rentals under those conditions they were injured in their property and business by excessive charges.

Bruce's Juices v. *American Can Co.*, 330 U. S. 743;
Paterson Paper Co. v. *Story Paper Co.*, 282 U. S. 555, 561-562;
Ellis v. *Inman, Poulsen & Co.*, 131 Fed. 182, 186;
Gibbs v. *McNeeley*, 118 Fed. 120, 126;
Lowry v. *Tile Association*, 115 Fed. 27; aff. 193 U. S. 38;
Straus v. *Victor Talking Machine Co.*, 297 Fed. 791, 802-803.

In the trial of the eviction suit, petitioners were not only given no opportunity to be heard or to present evidence in support of their counterclaims, but were affirmatively restricted and barred from such opportunity—among other things, by the order of the district court separating the eviction suit and the counterclaims for separate trials, by their obedience to that order, by the maintenance of that separation throughout the trial, and especially by the action of the court in receiving in evidence for respondents the judgments in the government case subject to the limitation that they should not constitute evidence of the conspiracy on which the counterclaims were based, and of which on those claims they are prima facie evidence under section 5 of the Clayton Act. The order thus became a device which deceived petitioners and caused them to remain inactive in the eviction suit as to the counterclaims, prohibited and disabled them from any action in that regard in the eviction suit, and then, with the judgment dismissing the counterclaims, penalized them for their inaction. No judgment entered in the eviction suit under such circumstances, could be conclusive against petitioners as to the counterclaims.

The right of petitioners to recover treble damages by reason of injury to their property and business, was a valuable property right. In sustaining the counterclaims as well pleaded and valid, the district court recognized the right of petitioners to a trial of the claims and to recover the damages proved.

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Short of permitting petitioners to file the counterclaims and sustaining them as lawful claims, no more complete denial of due process of law could occur. Dismissal of the counterclaims originated entirely with the trial judge, without any request therefor from the counterclaim defendants, without any previous notice to or knowledge of petitioners, without any hearing of any kind granted to petitioners, without affording petitioners at any time any opportunity whatever to present evidence in support of the claims, without requiring any evidence in rebuttal of the claims, and without the disclosure of any reason for dismissal by the district court except the brief statement that "we find no substantial evidence of a conspiracy in this case". (R. 94) The Court of Appeals likewise has failed to state any reason except the per curiam statement that the district judge "has thoroughly discussed the issues."

But the trial judge said that petitioners did in fact have "an opportunity" to establish conspiracy. In a short hearing on proposed findings, he said:

> You had an opportunity, and I thought you went into the matter very thoroughly * * * You weren't limited as to time. You spent lots of time up here trying to establish the facts. (R. 145)
> * * * you went on to say, "That there was a conspiracy, and as a consequence we are entitled to damages." (R. 145)

It is impossible, however, to reconcile these statements (1) with the fact that the court had stricken out as an improper collateral attack on the right to recover possession of the theatre, the defenses pleaded by petitioners which were based on the same facts on which the counterclaims were based, (2) with the fact that by a previous order of the court the eviction suit and the counterclaims were separated for trial, (3) with the fact that the court accepted, approved and enforced the thesis proposed by

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respondents that the trial should be confined to the question whether the franchise was in unlawful restraint of trade standing alone and apart from conspiracy, and (4) with the fact that the trial court ruled that the judgments in the government case offered in evidence by respondents as the essential basis of their right to eviction, should be limited to exclude the fact of conspiracy, of which, having been pleaded and offered by respondents, they were in law conclusive evidence against them.

In view of the fact that the judgments not only had this intrinsic conclusive evidentiary quality against respondents, but in a trial of the counterclaims would, under Section 5 of the Clayton Act, be prima facie evidence in favor of petitioners as to the conspiracy and all the other matters shown in *United States* v. *Paramount,* 334 U. S. 131, it is almost absurd to suppose that petitioners merely failed to use "an opportunity" to establish those facts.

Emich v. *General Motors Corp.,* 340 U. S. 558;
DeLuxe Theatre Corp. v. *Balaban & Katz,* 95 F. Supp. 983, 986.

The judgment, in so far as it dismissed the counterclaims, was therefore void.

Mullane v. *Hanover Bank,* 339 U. S. 306, 313, 314;
Betts v. *Brady,* 316 U. S. 455;
Morgan v. *United States,* 304 U. S. 1, 18-20;
Powell v. *Alabama,* 287 U. S. 45;
Windsor v. *McVeigh,* 93 U. S. 274.

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. (93 U. S. 277)

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The right to be heard is a constitutional right, and the entry of judgment against a party without hearing is a deprivation of due process of law.

American Surety Co. v. *Baldwin,* 287 U. S. 156, (1932);
In re Aughenbaugh, 125 F. 2d 887 (C. C. A. 3, 1942);
Osage Oil Refining Co. v. *Continental Oil Co.,* 34 F. 2d 585 (C. C. A. 10, 1929);
Wagoner National Bank v. *Welch,* 164 Fed. 813 (C. C. A. 8, 1908).

Full opportunity to be heard and compliance with other requirements of due process is essential to the conclusive effect and validity of a judgment.

Williams v. *North Carolina,* 325 U. S. 226, 230, 1946
McDonald v. *Mabee,* 243, U. S. 90.
Reynolds v. *Stockton,* 140 U. S. 254, 1891.

Any judgment in the eviction suit except a judgment limited solely to dismissal of that suit, was beyond the jurisdiction of the court, and, therefore, void. Inasmuch as the court had no jurisdiction to award any relief to the landlord which required a finding of violation of the anti-trust laws by the landlord, it was without jurisdiction to entertain and try the suit. A proceeding in which no judgment may be awarded to a plaintiff unless he succeeds in establishing that he was or is a law violator, is repugnant to the only proper function of a court, which is the administration of the law and not the serving of wrongdoing or unlawfulness. It is contrary to due process of law to require any defendant to defend such a suit.

This case is a good illustration of the unwisdom, waste and injustice involved in violating the rule that courts should not listen to wrongdoers. This landlord and tenant case, brought under the California three-day eviction statute, occupied the attention of the district court during more than four years, from May 1, 1947, to June 18, 1951 (R. 26, 111)—in interlocutory proceedings and pre-trial and other

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hearings on thirteen different occasions and in eighteen daily trial sessions of the court, all of which required the preparation, submission and consideration of numerous briefs and legal memoranda. (R. 423-424) Many persons were required to leave their own affairs and attend as witnesses, and an expensive transcript of proceedings of more than three thousand pages was accumulated. The fact that after all these proceedings the court refused eviction does not mean that it was not violating the rule against aiding wrongdoers in entertaining the suit. The court had no right to permit the landlord to present evidence, or otherwise to urge, that he had been guilty of law violation, and to impose upon the tenant the burden of controverting that position on pain of eviction. Due process required the court to take the landlord at his word and dismiss the suit.

> It is trite in our jurisprudence that contentions originating in unlawful purposes are not to be brought into courts of justice. * * * A controversy of this character can find no adjustment here, but the parties will be left as they stand.
>
> *Fabacher* v. *Bryant,* 46 La. Ann. 820, 826, 1894.
> *Warner Bros.* v. *Cooper Foundation,* 189 F. 2d 825, 829.

The Judgment Dismissing the Counterclaims is not Valid on Principles of Res Judicata

In barring a trial and recovery upon the counterclaims, the judgment, in effect, applies the rule of *res judicata* without complying with the requisites of that rule.

The use of a judgment in one action in bar of another action has occurred, so far as we have discovered, only when the second case has been instituted after or apart from the first case; and where the judgment in the first case has contained no express reference to the second case, and has not purported to be an adjudication against the second action by any specific identification of that action. The bar of the first judgment has been applied only at the instance and request of the party entitled to the

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bar, who in every case has of his own motion pleaded or otherwise formally brought the former judgment to the attention of the court. In those cases the proponent of the former judgment has also borne the conventional burden of proof to establish the existence, validity and controlling application of the first judgment to the second action. But in this case both judgments are combined in one judgment, the second action is expressly identified and expressly barred therein without any request or expectation therefor by any party in the case, and the beneficiary of the bar has been wholly relieved of any burden of proof or other requirement of lawful procedure.

It is improper for the court to bar an action on the basis of a former judgment, where it has not been asked to do so. The privilege to invoke the bar belongs to the party, who may, for reasons of his own, choose to ignore or waive the benefit of the former judgment.

Garden Club v. *Murrell,* 180 F. 2d 435, 436, CA 5, 1950; cert. den. 342 U. S. 299.
Donald v. *Lumber* Co., 68 F. 2d 441, 442, CA 5, 1934.
Pratt v. *Wilcox,* 64 F. 589, 592, 1893.

The dismissal of the counterclaims was also the result of a one-sided procedure. As a matter of law, the counterclaim defendants except the landlord, were not present at the trial of the eviction suit to which they were not parties, and they were not present in fact. (R. 129) As only one of the seven counterclaim defendants was a party to the eviction suit, no valid judgment on those claims favorable to petitioners could, under any circumstances, have been awarded against all the parties. For this dismissal to be valid it is necessary that it should also have been possible for petitioners to procure a valid judgment in the eviction suit on the counterclaims against all the counterclaim defendants. A procedure like that in this case in which only one of the parties could prevail, is not a constitutional procedure.

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There must be mutuality of estoppel. Hence, a judgment for or against one who is not a party to the litigation, is invalid and is not conclusive for or against him.

Robertson v. *Gordon,* 226 U. S. 311, 1912.
De Luxe Theatre Corporation v. *Balaban & Katz,* 88 F. Supp. 311.

No proper issue in the eviction suit was controlling as to the counterclaims. The correct and only proper issue in the eviction suit was whether the landlord was seeking relief upon the basis of his own wrongdoing.[1]

Little time and attention was needed to discover that the landlord based his claim on his own wrong, because it was definitely alleged on the face of his complaint; and not only was the unlawful character of the conduct undisputed, it was strenuously asserted by the landlord.

In *Warner Bros.* v. *Cooper Foundations,* 189 F. 2d 825, 829, the Court refused to favor such a wrongdoer.

> While this is not an action to enforce or recover on an illegal contract the only right which the plaintiff has, the only right it could have, grows out of one. * * * The plaintiff pleaded the contracts which constituted the illegal arrangement. It could not make its case without proving them.

The case should, therefore, have been summarily dismissed.

A former judgment is conclusive of a second case only (1) where both actions are based upon the same claim or

[1] Although Paramount Pictures Theatres Corporation, the landlord, and Paramount Pictures, Inc., the picture company, were different corporations, there was no factual distinction between them. The lease and franchise were originally made by the picture corporation. It organized and always owned all the stock of the theatre corporation. It conveyed the title of the theatre property, and assigned the lease thereof, to the theatre corporation. Both had the same business headquarters in New York City; both had the same officers and directors; and both were represented in this case by the same counsel. Both judgments in the government case offered in evidence by the landlord expressly applied to the landlord, in the statement that "Each of the defendant distributors, Paramount Pictures, Inc., * * * and each corporation in which said defendants or any of them own a direct or indirect stock interest of more than fifty per cent, is hereby enjoined:" etc. (R. 12, 113, 191, 221, 244, 293, 301, 312.) The district court disregarded the abstract distinction between them, in the finding that "Though contained in two separate documents the lease and the franchise agreement constituted but one agreement between the parties." (R. 97)

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demand, or (2) where they are upon different claims and the first action has required, and there has actually occurred in that action, the determination of a matter which is essential in the second.

United States v. *International Co.*, 345 U. S. 502, 505-506, 1953.
Emich v. *General Motors*, 340 U. S. 558, 568-569.
Vicksburg v. *Henson*, 231 U. S. 259, 1913.
Reynolds v. *Stockton*, 140 U. S. 254, 1891.
Barnes v. *Chicago Ry. Co.*, 122 U. S. 1.
Cromwell v. *County of Sac*, 94 U. S. 351.
Russell v. *Place*, 94 U. S. 606.

The only other issue which arose on the pleadings was whether the judgment in *United States* v. *Paramount*, 334 U. S. 131, applied to the franchise. The decision of this Court in that case on May 3, 1948, reversing the judgment as to franchises, rendered that issue entirely moot. Again, therefore, the suit should have been summarily dismissed.

The issue thereafter devised and tendered merely in oral argument by the landlord, i.e., whether the franchise was in unlawful restraint of trade standing alone, was accepted and approved by the trial judge; and on that issue the case was tried.

It is clear that none of these issues also arose upon or was controlling as to the counterclaims, the principal issues in those claims being (1) whether the landlord and the added counterclaim defendants had been engaged in the conspiracy in violation of the antitrust laws shown in *United States* v. *Paramount*, and (2) whether by reason of that conspiracy excessive terms, conditions and charges for pictures had been imposed on petitioners.

The district court made at least four important decisions in this case preceding the judgment, all of which applied the elementary distinction between the legality of the franchise standing alone and as part or a result of conspiracy, and all of which are in conflict with the dismissal of the counterclaims.

Those decisions were:

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1. The decision striking from petitioners' answer in the eviction suit the defense that the landlord was engaged in the conspiracy in the *Paramount* case, and was attempting to evict the theatre tenant in pursuance of that conspiracy. The ground of this decision was that, as to the right of the landlord to recover possession of the theatre, the conspiracy was immaterial, and to urge it was an improper collateral attack on that right; in a word, that the issue in the eviction suit was not conspiracy and was not affected by the conspiracy.

2. The decision sustaining the counterclaims as well pleaded and valid.

3. The decision separating the two cases for trial, and the actual separate trial of the eviction suit.

4. The decisions limiting the evidentiary effect of the judgments in the *Paramount* case, when introduced by the landlord in the eviction case, to the fact that they contained a prohibition of franchises, and refusing to treat them as evidence of the conspiracy on which they were based and which they enjoined, or as evidence that Paramount was a participant in that conspiracy.

In effect, the district court has inverted the elementary rule that where there is a conspiracy in restraint of trade, "The plan may make the parts unlawful" (*Swift & Co.* v. *United States*, 196 U. S. 375, 396), and has decided that where one part is lawful standing alone, the plan is lawful. This distinction between the legal character of the parts separately and collectively, although specifically pointed out by this Court as applicable in *United States* v. *Paramount*, 334 U. S. 131, was disregarded by the district court. This Court said:

> For here too the licenses are but a part of the general plan to suppress competition. The case where a distributor fixes admission prices to be charged by a single independent exhibitor, no other licensees or exhibitors being in contemplation, seems to be wholly academic. * * * (334 U. S. 144)

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It is elementary that judgments relative to the legality under the antitrust laws of acts and contracts standing alone and apart from conspiracy are not conclusive on the issue of the legality of the same acts and contracts in the context of conspiracy contrary to the antitrust laws.

Federal Trade Comm. v. *Motion Picture Advertising Services Co.*, 344 U. S. 392, 397-398.
Federal Trade Comm. v. *Cement Institute*, 333 U. S. 683, 706-709.
United States v. *United Shoe Mach Co.*, 258 U. S. 451.
United States v. *Reading Co.*, 226 U. S. 324.
Union Pacific Case, 226 U. S. 61; 226 U. S. 470.
Swift v. *United States*, 196 U. S. 375.
Aikens v. *Wisconsin*, 195 U. S. 194.

In *Federal Trade Commission* v. *Motion Picture Advertising Services*, 73 S. Ct. 361, a proceeding based on conspiracy, the Commission issued a cease and desist order against exclusive dealing contracts, and in a second proceeding against but one of the parties in the first proceeding sought a similar order against the same exclusive dealing contracts of the single respondent. This Court denied that the first order was conclusive in the second proceeding, saying:

> Finally, respondent urges that the sole issue raised in the Commission's complaint had been adjudicated in a former proceeding instituted by the Commission which resulted in a cease and desist order. 36 FTC 957. But that was a proceeding to put an end to a conspiracy between respondents and other distributors involving the use of these exclusive agreements. The present proceeding charges no conspiracy; it is directed against individual acts of respondents. The plea of res judicata is therefore not available since the issues litigated and determined in the present case are not the same as those in the earlier one * * * (p. 365)

In *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 706-709, this Court held that its decision in 1925

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in the so-called *Old Cement Case,* 268 U. S. 588, denying an injunction under the Sherman Act, was not a bar to the later order of the Trade Commission to cease and desist from similar practices as unfair methods of competition. This Court held that its decision in the *Old Cement Case* that the defendants had not engaged in a conspiracy in violation of the Sherman Act, was not conclusive of the question in the Trade Commission Case whether the defendants were engaged in a combination in restraint of trade which amounted to an unfair method of competition in violation of the Trade Commission Act, although the questions in both cases arose on substantially similar facts.

As to the *Old Cement Case,* this Court said, "We think it has little relevance, if any at all, to the issues in this case." (333 U. S. 706)

> The Court's holding in the Old Cement case would not have been inconsistent with a judgment sustaining the Commission's order here, even had the two cases been before this Court the same day. The issues in the present Commission proceedings are quite different from those in the Old Cement Case, although many of the trade practices shown here were also shown there. (p. 708)
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> * * * * * * *
>
> In the second place, individual conduct, or concerted conduct, which falls short of being a Sherman Act violation may as a matter of law constitute an "unfair method of competition" prohibited by the Trade Commission Act. A major purpose of that Act, as we have frequently said, was to enable the Commission to restrain practices as "unfair" which, although not yet having grown into Sherman Act dimensions would, most likely do so if left unrestrained. (p. 708)
>
> * * * * * * *
>
> These marked differences between what a court must decide in a Sherman Act proceeding and the duty of the Commission in determining whether conduct is to be classified as an unfair method of competition are enough in and of themselves to make the Old Cement decision wholly inapplicable to our problem in reviewing the findings in this case. (p. 709)

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The difference between the issue of the legality of exclusive dealing contracts when parts of a plan including other monopolistic practices, and the issue as to the legality of the same contracts standing alone, is illustrated in the *Shoe Machinery Cases.* In the first *Shoe Machinery Case,* 247 U. S. 32, 1918, it was held that acquisitions and marketing practices of the Shoe Machinery Corporation, which included leases of its machines containing the condition that the lessees should use its machines exclusively, did not constitute violation of the Sherman Act. In the second case (258 U. S. 451, 1922), it was held that the same restrictive leases did violate the kindred Clayton Act. The judgment in the first case as to the legality of the collective activities was therefore held not conclusive in the second case as to the legality of one of those activities. The District Court made the following statement in the second case, which was affirmed by this Court:

> To obtain the relief in that case the complaint charged that the defendants, by combinations with other shoe machinery manufacturers and the acquisition of the business of competitors, had obtained a monopoly of the foreign trade and commerce in shoe machinery, in restraint of trade, in violation of the Sherman Act, and that they had succeeded in that object. Among the numerous alleged unlawful acts charged, which made it possible for them to achieve that object was the insertion of these tying clauses in the leases. But this was only one of the acts charged to accomplish the result complained of. This allegation was therefore collateral to the main issue, and could only have been incidentally considered by the court. In this action no attack is made on any of the acts complained of, and which were the basis of the former suit, except the tying clauses. Nor is the object of the suit the same. (264 F. 138, 156, 1920.)

In *United States* v. *Reading Company,* 226 U. S. 324, 1912, three railroad companies who owned, mined and shipped about 75 percent of the anthracite coal, made con-

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tracts with the independent collieries along their lines requiring the sale to the railroads of their entire product at 65 percent of the tidewater price. It was argued that the contracts were not violative of the antitrust laws, because (1) they "are not, in themselves, unlawful and unreasonable restraints of interstate trade and commerce", (2) they "are perfectly honest, straightforward, and legitimate sales of coal", and (3) are "bona fide transactions for the sale of the product of the particular collieries involved, untainted by any ulterior or illegal purpose or design." (ibid., pp. 331-332)

The Court said :

> It is obvious that the averments do not touch upon the legality of the contracts considered severally, and ask no relief upon the theory that each was a contract in restraint of trade. The theory and charge of the bill is that by concerted action between the defendants the independent operators were to be induced to enter singly into uniform agreements for the sale of the entire output of their several mines and any other they might thereafter acquire, excluding a negligible amount of unmarketable coal and coal for local consumption. And the further theory of the pleading is that by such concerted action and through the higher price offered, the defendants would obtain such control of independent coal as to prevent competition in the markets of other States.
>
> It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful. (ibid., pp. 357-358)

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In the *Southern Pacific Case,* 259 U. S. 214, this Court held, in effect, that a previous judgment in the *Union Pacific Case,* 226 U. S. 61; 226 U. S. 470, that the combination of the Union Pacific and the Southern Pacific railroads was a violation of the antitrust laws was not also a judgment as to the legality under the antitrust laws of a combination of the Southern Pacific and the Central Pacific Railway Company. In the *Union Pacific Case,* the government, in a suit filed February 1, 1908, procured a judgment for separation of the Union Pacific and the Southern Pacific, both of which traversed the country west of the Mississippi to the Pacific Coast, as in violation of the antitrust laws. In the *Southern Pacific Case,* filed February 11, 1914, the government sought to require the Southern Pacific to divest itself of stock control of the Central Pacific, a line serving the area between Ogden and San Francisco, a control held before and at the time of the judgment in the *Union Pacific case.* The contention that the judgment in the *Union Pacific case* was an adjudication against the government in favor of the legality of the combination of the Southern Pacific and Central Pacific, was overruled.

> The conclusive answer to this contention is that the Central Pacific was not a party to that suit up to the final decree in this court. That suit and the present one do not relate to the same subject matter. The issues and questions, therein decided, are not the ones presented for decision here. (259 U. S. 240)

In *Swift* v. *United States,* 195 U. S. 375, 1905, competitive meat packers acted in concert on buying and selling prices, raising and lowering prices, placing restrictions on shipments of meat, making charges for cartage, etc. It was argued that these acts were lawful because they were the individual acts of the defendants relative to their own property, in private sales by themselves; hence the charge was of a conspiracy "to do a lawful act, the exercise of a constitutional right, viz: to raise, lower, fix and maintain their own prices, for their own property, in private sales

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thereof by themselves", and "the lawful act of fixing their own charges for cartage." (ibid., p. 382-383)

This Court said:

> The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. * * * The unity of the plan embraces all the parts. (ibid., p. 396)

The Court of Appeals and the District Court Have Approved as Lawful the Very Same Restraints of Trade Disapproved as Unlawful by This Court in the Paramount Case.

Despite the fact that the district court made general conclusions in its findings and opinion that no conspiracy existed, it made specific findings the correct effect of which is to the contrary (supra, pp. 13-14). (R. 79-90, Q. 101-106)

The findings and opinion show that in the Los Angeles area the major picture distributing companies are continuing to practice the same conspiracy and monopoly system of runs and clearances and allocation of pictures among the exhibitors, the same vertical combination control by the major picture distributing companies of the first run theatres, the same preferential licensing of first run pictures to the vertical combination theatres and the same discrimination against independents, which were found by the district court and this Court in the *Paramount case* to exist on a nationwide scale, including Los Angeles, and to be the result of conspiracy and therefore unlawful.

The district court said that a "code of conduct", a "scheme of distribution", a "course of action", and a "plan", had been "accepted and adopted" and "built up", by all of the major distributing companies, and was then in effect, for allocating the runs and clearances, and

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fixing minimum admission prices, etc., for theatres in the entire Los Angeles area. (R. 79-82, 101-103). It found that this system of runs and clearances was "a matter of necessity" because "some adequate scheme of distribution must be developed". (R. 80, 102)

These findings are substantially the same as those of the district court in *United States* v. *Paramount,* 70 F. Supp. 53, 1947, fully affirmed by this Court, 334 U.S. 131. On the same subject, the district court in its opinion in that case after the mandate of this Court, said:

> But here we are presented with a conspiracy among the defendants to fix prices, runs and clearances which we have already pointed out was powerfully aided by the system of vertical integration of each of the five major defendants. Such a situation has made the vertical integrations active aids to the conspiracy and has rendered them in this particular case illegal, however innocent they might be in other situations. . . . Here, the vertical integrations were a definite means of carrying out the restraints and conspiracies we have described. Moreover, we concluded in our prior findings, and the Supreme Court has affirmed our conclusion, that the distribution practices of the defendants constituted an attempt to obtain a monopoly in exhibition forbidden by the Sherman Act, . . .
>
> In respect to monopoly power, we think it existed in this case. As we have shown, the defendants were all working together. There was a horizontal conspiracy as to price-fixing, runs and clearancse. The vertical integrations aided such a conspiracy at every point.
>
> • • • • • • • • • •
>
> If an intent to exercise the power be thought important, it existed in this case, as we noted above in finding an attempt to monopolize. (*United States* v. *Paramount,* 85 F. Supp. 893-894.)

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CONCLUSION

The judgment should be reversed and the counterclaims of the petitioners allowed to proceed to trial.

Respectfully submitted,

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